



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE TOKYO WASHINGTON, D.C.



# THE ROLE OF DISCLOSURE COUNSEL

Presented by Eric D. Tashman, Partner  
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Disclosure Counsel, *like* Bond Counsel,  
represents the Issuer

*Unlike* Underwriters' Counsel,  
Disclosure Counsel's fiduciary  
obligations are to the Issuer (even if  
Disclosure Counsel's opinion is  
addressed to the Underwriters in a  
negotiated financing)

# Disclosure Counsel's Principal Function:

- Advise the Issuer on developing procedures by which the Issuer can satisfy its securities law obligation
- Advise the Issuer on the appropriate scope of disclosure
- Deliver a 10b-5 opinion to the Underwriters and (frequently) the Issuer
- Advise the Issuer on continuing disclosure (sometimes)

# The 10b-5 Opinion: The “Meat”

“Nothing has come to the attention of the attorneys in the firm rendering legal services related to the bonds that has caused us to believe that the Official Statement (excluding, with your permission, the portions of the Official Statement identified in the preceding paragraph), as of its date and as of the date hereof, contained or contains any untrue statement of a material fact or omitted or omits to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading.” See attachment for complete form of Opinion.

# Origin of 10b-5 Opinion: Negative Assurance

- Rule 10(b)-5 under '34 Act
- Underwriters require such an opinion to satisfy their “due diligence” obligations under federal securities laws
- Not really an “opinion”
- Not a guarantee – the City of San Diego had disclosure counsel!

# Other Legal Opinions

How does Disclosure Counsel's Opinion differ from:

- the opinion of Underwriters' Counsel
- Bond Counsel's "Supplemental Opinion"

## Pay Attention to Exclusions:

- Customarily excludes:
  - financial and statistical information, economic forecasts, and assumptions
  - information about bond insurers or other third party credit enhancers
  - information about the Depository Trust Company
- Sometimes excludes information, including appendices, which should not be excluded
- Watch out for wholesale exclusions.
- READ THE OPINION!



## Other Qualifications

- Disclosure Counsel must rely upon the Issuer to bring facts to Disclosure Counsel's attention
- Disclosure Counsel will disclaim responsibility for accuracy of the information and facts it reviewed
- Disclosure Counsel will state that it is relying upon certificates and opinions from Issuer and Issuer's in-house counsel
- Disclosure Counsel is NOT Issuer's general counsel

# Affirmative Undertaking by Disclosure Counsel

- Disclosure Counsel should affirm that it has advised the Issuer of its obligations under applicable federal securities laws

# Remember:

Disclosure Counsel Opinion is not a Guarantee, and does not relieve the Issuer of its obligations under the federal securities laws, although it contributes to meeting those obligations.



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**ERIC D. TASHMAN** is a public finance partner in the San Francisco office and head of the firm's West Coast public finance practice group. He joined the firm in 1975 and has acted as bond counsel and underwriter's counsel to states, cities, counties and special districts throughout the country. Mr. Tashman has special experience in the financing of electric utility, airport, port and other transportation, water and sewer, and resource recovery projects. Mr. Tashman has been at the forefront of the development of the securitizations of municipal or statutorily created assets. He has served as counsel to numerous states and municipalities in connection with the issuance of over \$20 billion of "stranded cost" and tobacco revenue securitizations.

Mr. Tashman is a frequent lecturer to the municipal bond industry.

**Admissions and Certifications:**

California, 1984, New York, 1976

**Education:**

New York University School of Law (J.D., 1975);  
University of Pennsylvania (B.S., B.A., 1972)